Board of Alien Labor Certification
United States Department of Labor
Washington, D.C.

DATE: December 4, 1997
CASE NO: 96-INA-177

In the Matter of:

JOE J. URSO
Employer

On Behalf of:

MARIA CONCEPCION ULLOA
Alien

Before: Holmes, Huddleston, and Neusner
Administrative Law Judges

JOHN C. HOLMES
Administrative Law Judge

DECISION AND ORDER

The above action arises upon the employer's request for review pursuant to 20 C.F.R. 656.26 (1991) of the denial by the United States Department of Labor Certifying Officer ("CO") of alien labor certification. This application was submitted by employer on behalf of the above-named alien pursuant to §212 (a) (5) of the Immigration and Nationality Act of 1990, 8 U.S.C. § 1182 (a) (5) ("Act"). The certification of aliens for permanent employment is governed by § 212 (a) (5) (A) of the Act, 8 U.S.C. §1182 (a) (5) (A), and Title 20, Part 656 of the Code of Federal Regulations ("CFR"). Unless otherwise noted, all regulations cited in this decision are in Title 20.

Under § 212 (a) (5) of the Act, as amended, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor is ineligible to receive labor certification unless the Secretary of Labor has determined and certified to the Secretary of State and Attorney General that, at the time of application for a visa and admission into the United States and at the place where the alien is to perform the work: (1) there are not sufficient workers in the United States who are able, willing, qualified, and available; and, (2) the employment of the alien will not adversely affect the wages and working conditions of United States workers similarly employed.

We base our decision on the record upon which the CO denied certification and

employer's request for review, as contained in the Appeal File,[1] and any written argument of the parties. § 656.27 (c).

Statement of the Case

On January 12, 1994, Joe J. Urso ("employer") filed an application for labor certification to enable Maria Concepcion Medina Ulloa ("alien") to fill the position of domestic housekeeper at an hourly wage of $4.67 (AF 8). The job duties are described as "cleaning house, vacuum cleaning, cooking, washing cloths [sic]" (AF 8). There were no job requirements specified by the employer.

On March 21, 1995, the CO issued a Notice of Findings proposing to deny the labor certification. The CO cited a violation of § 656.21 (b) (6) which provides that U.S. workers applying for a job opportunity offered to an alien may be rejected solely for lawful, job-related reasons. The CO found that the employer failed to provide lawful, job-related reasons for the rejection of Applicants Blanca Mariscal, Margarita Duran, and Virginia Palarine. The CO also challenged the employer's compliance with § 656.21 (b) (2) which provides that an employer is required to document that the requirements for the job, unless adequately documented as arising from business necessity, are those normally required for the performance of the job. Specifically, the CO found that the employer's requirement that the worker live on the premises was restrictive. The CO reasoned that the duties of the offered position could be adequately performed by live-out workers.[2] The CO also determined that the employer failed to comply with § 656.21 (a) (3) (ii) which provides that where an application involves a job offer as a live-in domestic worker, the employer must submit two copies of the contract of employment. The CO also disputed the employer's compliance with § 656.21 (a) (3) (iii) (A) and (B) which provide that the employer must provide evidence of the alien's one-year paid experience as a private household worker. Finally, the CO found that the employer did not comply with § 656.21 (g) which indicates that the advertisement shall include the rate of pay, the minimum job requirements, and the job opportunity with particularity.

In rebuttal, dated April 4, 1995, the employer stated that the worker was not required to live on the premises. Nonetheless, the employer submitted the requested evidence relating to the live-in requirement including a contract of employment. The employer also stated that the alien's paid experience was in 1988 when she worked for the employer in California. The employer, however, failed to address the issue relating to the rejection of three U.S. applicants.

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[1] All further references to documents contained in the Appeal File will be noted as "AF."

[2] Although the employer did not explicitly require that the worker live on the premises on the application, the CO concluded that the employer sought a live-in employee because he filled out Item 20 on ETA Form 750A which is to be filled out only when a live-in employee is being sought.

The CO issued the Final Determination on May 1, 1995 denying the certification application. The CO noted that the employer did not rebut or cure all of the deficiencies in the NOF (AF 13). On May 9, 1995, the employer requested administrative review of Denial of Labor Certification (AF 1).

Discussion

The issue presented by this appeal is whether an employer's application may be denied where the employer fails to rebut all of the CO's determinations in the Notice of Findings.

In the NOF, the CO determined that the employer unlawfully rejected U.S. Applicants Mariscal, Duran, and Palarine. Generally, an employer must show that U.S. applicants are rejected solely for lawful, job-related reasons. § 656.21 (b) (6). Furthermore, the job opportunity must have been open to any qualified U.S. worker. § 656.20 (c) (8). Therefore, an employer must take steps to ensure that it has obtained lawful, job-related reasons for rejecting U.S. applicants, and not stop short of fully investigating an applicant's qualifications.

In rebuttal, the employer failed to address the rejection of the three U.S. applicants. Section 656.25 (e) provides that the employer's rebuttal evidence must address all of the findings in the NOF and that all findings not rebutted shall be deemed admitted. On this basis, the Board has repeatedly held that a CO's finding which is not addressed in rebuttal may be deemed admitted. *Belha Corp.* , 88-INA-24 (May 5, 1989) (*en banc*); *Gemmel and Associates*, 93-INA-482 (June 3, 1994); *Mr. & Mrs. Mohammad Yusuf*, 93-INA-334 (July 22, 1994); *Ida Lubliner*, 93-INA-150 (Sept. 26, 1994); *Armrest Security*, 93-INA-240 (Nov. 3, 1994); *Mr. & Mrs. Sidney R. Siben*, 93-INA-236 (Nov. 29, 1994). Accordingly, we find that certification was properly denied.

ORDER

The Certifying Officer's denial of labor certification is hereby AFFIRMED.

For the Panel:

JOHN C. HOLMES
Administrative Law Judge

NOTICE FOR PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary of Labor unless, within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except: **(1)** when full Board consideration is necessary to secure or maintain uniformity of its decision; and, **(2)** when the proceeding involves a question of exceptional importance. Petitions for such review must be filed with:

Chief Docket Clerk
Office Of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced type-written pages. Responses, if any, shall be filed within 10 days of service of the petition, and shall not exceed five double-spaced type-written pages. Upon the granting of a petition, the Board may order briefs.